



**NOTICE OF MODIFICATIONS OF PROPOSED REGULATIONS
AND PUBLIC HEARING**

**California Code of Regulations
Title 2. Administration
Division 1. Administrative Personnel
Chapter 1. State Personnel Board
Article 4. Hearings and Appeals**

DATE: November 11, 2005

TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET

SUBJECT: TITLE 2, CALIFORNIA CODE OF REGULATIONS §§ 57.1
THROUGH 57.4 – DISCOVERY IN EVIDENTIARY HEARINGS
REGULATIONS

Under the authority established in Government Code (GC) § 18701, and pursuant to GC § 11346.8(c), the State Personnel Board (SPB) is providing notice of changes that are being considered concerning the above-named regulations, which were the subject of public hearings held in August and October 2005. As a result of written comments and oral testimony received, parts of the regulations have been modified from what was originally made available. Please take notice that a public hearing regarding the modifications to the original proposed regulations made available is scheduled for:

Date and Time: December 6, 2005 – 10:00 a.m. to 10:30 a.m.

Place: 455 Golden Gate Avenue, Benicia Room
San Francisco, CA 94102

Purpose: To receive comments about this action.

A copy of the full text of the regulations as originally proposed and the modifications are attached. SPB's rulemaking file on the proposed action is open to public inspection by appointment Monday through Friday, from 8:00 a.m. to 5:00 p.m. at 801 Capitol Mall, Room 555, Sacramento, CA 95814.

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WRITTEN PUBLIC COMMENT PERIOD:

The written public comment period will close on Monday, November 28, 2005 at 5:00 p.m. Any person may submit written comments about the proposed modifications. To be considered by SPB, written comments must be received by Bruce Monfross at SPB, P.O. Box 944201, Sacramento, CA 94244-2010, before the close of the written comment period. During this comment period, written comments may also be e-mailed to Bruce Monfross at bmonfross@spb.ca.gov or faxed to (916) 653-4256.

Additional information or questions regarding the substance of the proposed action should be directed to Bruce Monfross at (916) 653-1403. Questions regarding the regulatory process in conjunction with these regulations may be directed to Elizabeth Montoya, the backup contact person, at (916) 654-0842 or TDD (916) 653-1498.

/s/Laura M. Aguilera

Laura M. Aguilera
Assistant Executive Officer

Attachment: Proposed Text of Amended Regulations

REGULATIONS GOVERNING DISCOVERY IN EVIDENTIARY HEARINGS

Changes to the original text are illustrated in the following manner: regulation language originally proposed is underlined; deletions from the language originally proposed are shown in strikeout using a “-”, *italicized text* with a single underline indicates original proposed changes due to clerical error were inadvertently designated as being deleted instead of added, and additions to the language originally proposed are double underlined and italicized.

TITLE 2. Administration DIVISION 1. Administrative Personnel CHAPTER 1. State Personnel Board SUBCHAPTER 1. General Civil Service Regulations ARTICLE 4. Hearings and Appeals

§ 57.1. Discovery in Evidentiary Hearings ~~Other than Adverse Actions;~~ Exclusive Provisions Before the Board or a Board Administrative Law Judge.

~~The provisions of Section 57.2 – 57.4 provide the exclusive right to and method of discovery for evidentiary hearings conducted before the Board and/or Board administrative law judges concerning appeals from discrimination (Sections 54 and 54.2), and when a petition for hearing is granted from the Notice of Findings issued in relation to a complaint of whistleblower retaliation (Sections 56– 56.8). These provisions shall also apply when discrimination or retaliation is raised as an affirmative defense in an answer or appeal filed with the Board pursuant to the provisions of Section 51.2 concerning Notices of Adverse Action (Government Code Sections 19575 and 19590), Rejections During Probationary Period (Government Code Section 19175), Medical Actions (Government Code Section 19253.5), and Non-Punitive Actions (Government Code Section 19585).~~

(a) An employee who is served with a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19574 or 19590 shall be entitled to conduct discovery in accordance with the provisions of Government Code sSections 19574.1 and 19574.2. In those cases where an employee raises an affirmative defense alleging discrimination or retaliation when filing an answer to a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19575 or 19590, or in those cases where an employee raises an affirmative defense of retaliation or discrimination during the course of a hearing before the Board or an administrative law judge regarding an appeal from adverse action, the appointing power or any other named respondent shall be entitled to conduct discovery regarding any such affirmative defense in accordance with the provisions of Sections 57.2 – 57.4.

(b) Any party to any other type of action scheduled for hearing before the Board and/or a Board administrative law judge, including but not limited to, rejections during probationary period (Government Code Section 19173), discrimination complaints (Government Code Section 19702), appeals from denial of reasonable accommodation

Proposed Discovery Regulations

(Government Code Section 19702), whistleblower retaliation complaints (Education Code Section 87164, Government Code Sections 8547.8 and 19683), appeals from non-punitive action (Government Code Section 19585), appeals from medical action (Government Code Section 19253.5), appeals from Career Executive Assignment termination (Government Code Section 19889.2), and appeals from constructive medical termination, shall be entitled to conduct discovery in accordance with the provisions of Sections 57.2 – 57.4.

(c) The discovery provisions set forth in Sections 57.2 – 57.4 shall not apply to those cases scheduled for hearing or review by the Executive Officer or a Board hearing officer, to informal hearings conducted by Board administrative law judges pursuant to Government Code Section 11445.10 et seq., to those cases assigned to hearing before a Board administrative law judge pursuant to the provisions of Section 52(b), to appeals from termination of Limited Term employees pursuant to Section 282, to appeals from termination of a Limited Examination and Appointment Program appointment pursuant to Section 547.57, or to any other appeal or complaint excluded from the formal evidentiary hearing process pursuant to statute or regulation.

(d) The time frames for service of process set forth in Sections 57.2 – 57.4 shall apply in those circumstances where service is made or attempted by mail, and service shall not be deemed effective on the date of mailing. Instead, service by mail shall be deemed effective only upon such time as the document being served is either actually received by the person or entity being served, or is legally presumed to have been delivered pursuant to the provisions of Code of Civil Procedure Section 1013, whichever date occurs first.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; and Sections 8547.8, 11445.10 et seq., 18670, 18671, 18672, 18672.1, 18673, 18675, 19173, 19175, 19253.5, 19574, 19574.1, 19574.2, 19575, 19585, 19590, 19683, and 19700-19706, and 19889.2, Government Code, and Section 1013, Civil Procedures Code.

§ 57.2. Request for Discovery; Statements; Writings; Investigative Reports; Witness List.

(a) Each party to ~~the~~ an appeal or complaint listed in Section 57.1(a) or (b) and scheduled for a hearing is entitled to serve a request for discovery on any other named party to the complaint or appeal as allowed by subdivisions (c) - (e), and Government Code Section 18673. All requests for discovery shall be made served on the responding party ~~no later than 36~~ 40 calendar days prior to the initial hearing date, except upon a petition and showing of good cause by the party seeking discovery, and a finding by the administrative law judge, in his or her sole discretion, that such additional or late requests for discovery should be permitted in the furtherance of justice. For purposes of this ~~§~~ Section, the term "party" is defined as the person, ~~to include or~~ appointing powers, filing the appeal or complaint, any named respondent, and his or her their designated legal representative, ~~s as well as any person, to include~~

appointing powers, specifically identified in the appeal as a named respondent, and his or her designated legal representative.

~~(b) When an appeal is amended, all parties, other than the amending party, may serve a request for discovery on any other party to the appeal within 5 days of service of the amended appeal. Such requests for discovery shall be limited solely to those additional issues, if any, raised in the amended appeal. The administrative law judge may, in his or her discretion, extend the time period for requesting discovery under this subdivision upon a showing of good cause.~~

~~(eb) Each party to the appeal or complaint is entitled to request and receive from any other party to the appeal or complaint the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party, unless and of individuals who may be called as witnesses during the course of the hearing, except to the extent that disclosure of the address is prohibited by law. Each party to the appeal is also entitled to request and receive from any other party to the appeal the names and addresses of individuals who may be called as witnesses to testify during the course of the hearing. The responding party may, in his or her discretion, provide either the home or business address of the witness, unless except to the extent that disclosure of the address is prohibited by law.~~

~~(dc) Each party to the appeal or complaint is entitled to inspect and make a copy of any of the following non-privileged materials in the possession, custody, or control of any other party to the appeal or complaint:~~

~~(1) Statements, as that term is defined in Evidence Code Section 225, of witnesses then proposed to be called as witnesses during the hearing by the party and of other persons having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal; The responding party shall, upon a showing of good cause and subject to the discretion of the administrative law judge, subsequently amend this list if it intends to call additional witnesses not previously disclosed;~~

~~(2) All writings, as that term is defined in Evidence Code Section 250, that the responding party then proposes to enter into evidence; The responding party shall, upon a showing of good cause and subject to the discretion of the administrative law judge, subsequently provide the requesting party with additional writings that it proposes to enter into evidence;~~

~~(3) Any other writing or thing that is relevant to the appeal or complaint; and~~

~~(4) Investigative reports made by or on behalf of any party to the appeal or complaint pertaining to the subject matter of the proceeding, to the extent that these reports: (A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law, or (B) reflect matters perceived by the investigator in the course of his or her investigation, or (C) contain or include by attachment any statement or writing described in (A) to (C), inclusive, or summary thereof.~~

~~(e) For the purpose of this section, in those instances where an audio tape recording is provided, and all or portions of the tape are inaudible due to poor tape quality, the producing party shall, upon the request of the party requesting the discovery, provide a second, more audible, version of the tape recording, if possible. In~~

~~those instances where a better quality tape recording does not exist, the producing party shall provide a copy of a written transcript of the tape recording, if such transcript exists. The producing party shall not be required to produce a copy of a written transcript for any requested tape recording, if such transcript does not already exist.~~

~~(fd) All parties receiving a request for discovery shall produce the information requested, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production, within 12 15 calendar days of receipt of the discovery request, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production.~~

~~*(e) Not less than 10 calendar days prior to the first scheduled hearing date on the merits, each party shall notify the other parties in writing of the identity and current business address of each expert witness to be presented as a witness at the hearing, and a brief narrative statement of the qualifications of such witnesses and the general substance of the testimony which the expert is expected to provide. At the same time, the parties shall also exchange all written reports prepared by each expert witness. The administrative law judge may permit a party to call an expert witness not included on the list upon a showing of good cause.*~~

~~(g) Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.~~

~~(h) For purposes of this section, service may be accomplished by mailing the request for discovery to the home or business address of the party from whom discovery is sought. Each request for discovery shall have attached a proof of service.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Sections 225 and 250, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

§ 57.3. Petition to Compel Discovery.

~~(a) Any party claiming his or her request for discovery pursuant to Section 57.2 has not been complied with. A party may serve and file with the administrative law judge a petition to compel discovery, naming as responding party the any party who has refused or failed to comply with provide discovery as required by Section 57.2. A copy of the petition shall be served on the responding party on the same date the petition is filed with the administrative law judge. For purposes of this section, service may be effected on the responding party by mailing a copy of the petition to compel discovery, with proof of service attached, to the home or business address of the responding party.~~

~~(b) The petition shall state facts showing the responding party failed or refused to comply with Section 57.2, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under that sSection, that a reasonable and good faith attempt to contact the responding party for an informal resolution of the~~

issue has been made, and the grounds of the responding party's refusal, so far as known to the moving party.

~~(c) The petition shall be served upon the administrative law judge and responding party within 5 days after the responding party refused or failed to comply with the request, or within another time provided by stipulation, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the initial hearing date, except upon petition and determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.~~

~~(d) The responding party shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to compel discovery. For purposes of this section, service may be effected on the petitioner by mailing a copy of the answer, with proof of service attached, to the home or business address of the petitioner.~~

~~(e) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.~~

~~(f) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within 5 days of receipt of the responding party's answer to the petition to compel discovery or, if no answer is submitted, within 5 days of the date that such answer was due. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The parties may appear at any such hearing via telephone. The administrative law judge shall decide the petition on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.~~

~~(g) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is entitled to discover under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.~~

~~(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.~~

(c) (1) The petition shall be served upon the responding party and filed with the administrative law judge within 14 days after the responding party first evidenced his or her failure or refusal to comply with Section 57.2 or within 30 *calendar* days after the request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within ~~15~~ 20 *calendar* days of the date set for commencement of the administrative hearing, except upon a petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay the commencement of the administrative hearing on the date set, and the possible prejudice of the action to any party.

(2) The responding parties shall have a right to file a written answer to the petition. Any answer shall be filed with the administrative law judge and served *on* the petitioner within ~~15~~ 10 *calendar* days of service of the petition.

(3) (A) Unless otherwise stipulated by the parties and as provided by this sSection, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within ~~20~~ 15 *calendar* days after the filing of the petition. Nothing in this sSection shall preclude the administrative law judge from determining that an evidentiary hearing *on the underlying matter* shall be conducted prior to the issuance of a decision on the petition. The administrative law judge shall serve a copy of the order upon the parties by mail and/or by facsimile transmission.

(B) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(id) A ruling of the administrative law judge concerning a motion to compel the production of evidence or to compel the attendance of a witness is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a motion *petition* to compel the production of evidence or to compel the attendance of a witness may, within 30 *calendar* days of the service of the decision, file a petition to compel discovery in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. ~~The hearing shall be continued pending resolution of any such interlocutory appeal.~~

(e) *The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.*

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

§ 57.4. Petition to Quash or for Protective Order.

(a) Any party claiming that a request for discovery pursuant to Section 57.2 is improper under that Section or is otherwise privileged or exempt ~~for~~ from discovery, may object to its terms by serving and filing with the administrative law judge and the party requesting the disputed discovery, a petition to quash or for a protective order. The petition shall state: (1) a description of the matters sought to be discovered; (2) the reason(s) why the matter is not discoverable under Section 57.2, or is otherwise privileged or exempt from discovery; and (3) that a reasonable and good faith attempt has been made to contact the requesting party and resolve the matter informally.

~~(b) The petition shall be served upon the administrative law judge and the party requesting discovery within 10 days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party. For purposes of this section, service may be effected on the party requesting discovery by mailing a copy of the petition, with proof of service attached, to the home or business address of the party requesting discovery.~~

~~(c) The party requesting discovery shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to quash and/or for a protective order. For purposes of this section, service may be effected on the petitioner by mailing a copy of the answer, with proof of service attached, to the home or business address of the petitioner.~~

~~(d) Where the matter sought to be protected is in the possession, custody or control of the moving party, and the moving party asserts that the matter is not a discoverable matter under the provisions of Section 57.2, or is otherwise privileged or exempt from discovery, the administrative law judge may order lodged with him or her matters provided in Section 915(b) of the Evidence Code and examine the matters in accordance with those provisions.~~

~~(e) Unless otherwise stipulated by the parties, and as provided in this section, the administrative law judge shall review the petition and any response filed by the responding party and issue a decision granting or denying the petition within 5 days of receipt of the responding party's answer to the petition. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The~~

~~parties may appear at any such hearing via telephone. The administrative law judge shall decide the case on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.~~

~~(f) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is not required to produce to the party seeking discovery under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production, if any, is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.~~

(b) (1) The petition shall be served upon the party seeking discovery and filed with the administrative law judge within 10 *calendar* days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.

(2) The party requesting discovery shall have a right to file a written answer to the petition with the administrative law judge and served on the petitioner within 5 *calendar* days of the service of the petition to quash and/or for a protective order.

(3) (A) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response and issue a decision granting or denying the petition within 20 *calendar* days after the filing of the petition.

(B) The administrative law judge shall have the discretion to continue any evidentiary hearing or to conduct the hearing prior to the issuance of a decision on the petition.

(C) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(gc) A ruling of the administrative law judge concerning a petition to quash or for a protective order is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a motion *petition* to quash the production of evidence and/or for a protective order may, within 30 *calendar* days of the service of the decision, file a petition to quash and/or for protective order in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed

discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. ~~The hearing shall be continued pending resolution of any such interlocutory appeal.~~

~~(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.